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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

12 ADEIFE OMOTADE,) Case No: CV 07 5683 MMC
13 Plaintiff,)
14 vs.)
15 HAROLD B. GLASSBERG, HAROLD B.) DEFENDANTS' HAROLD B.
AUERBACH, JON-MICHAEL MCSWEENY,) GLASSBERG, HAROLD B. AUERBACH,
ROBERT L. POLLAK, GLASSBERG,) ROBERT L. POLLAK, JON-MICHAEL
POLLAK & ASSOCIATES, NORTHFIELD) MCSWEENY, GLASSBERG, POLLAK &
MOUNT HERMON SCHOOL, A) ASSOCIATES MEMORANDUM OF
CORPORATION, AND DOES 1-25) POINTS AND AUTHORITIES IN
Defendants.) SUPPORT OF THEIR MOTION TO
DATE: January 4, 2008
TIME: 9:00 a.m.
DEPT.: Courtroom 7

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1 **I. RELIEF REQUESTED**

2 Defendants Harold B. Glassberg, Harold B. Auerbach, Jon-Michael McSweeney,
 3 Robert L. Pollak, and Glassberg Pollak & Associates (“Defendants”) hereby move to dismiss the
 4 complaint of Adeife Omotade without leave to amend. Defendants’ motion is made pursuant to
 5 Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be
 6 granted as a matter of law.

7 **II. STATEMENT OF FACTS**

8 Defendants served as legal counsel for Northfield Mount Hermon School (“Mount
 9 Hermon”) in a debt collection matter filed against Adeife Omotade in Alameda County Superior
 10 Court Case Number 2001-28047 (the “Underlying Action”) (Plaintiff’s Complaint (“COM”)
 ¶¶ 10, 12.) On June 6, 2002, Mount Hermon and Omotade entered into a settlement agreement
 12 and stipulation. (COM ¶ 12.) Pursuant to the terms of the settlement and stipulation, Omotade
 13 was required to pay \$200.00 on the 25th of each month to Mount Hermon until all outstanding
 14 debts were fully paid off. (COM ¶ 13.) At Omotade’s request, the agreement was later modified
 15 to allow Ms. Omotade to pay \$50.00 per month for a defined period of time. (COM ¶ 14.)
 16 Ms. Omotade made late payments. (COM ¶ 15)

17 On October 10, 2006 Defendants appeared ex parte in Alameda Superior Court on behalf
 18 of Mount Hermon in order to obtain a judgment, as allowed by the settlement agreement, against
 19 Ms. Omotade for failure to satisfy the terms of the settlement agreement. (COM ¶ 16.) In order
 20 to obtain the judgment, Mount Hermon submitted a declaration signed by defendant Harold
 21 Burton Glassberg, delineating Ms. Omotade’s payment defaults. (COM ¶¶ 16, 17.) On
 22 October 20, 2007, the Alameda County Superior Court entered judgment against Ms. Omotade.
 23 (COM ¶ 24.) Mount Hermon obtained a writ of execution and levied on Ms. Omotade’s bank
 24 account and seized money to satisfy the judgment on April 11, 2007. (COM ¶ 25.)

25 Omotade moved to set aside the judgment, and Defendants drafted and filed an
 26 opposition to said motion. (COM ¶¶ 26, 29.) On June 19, 2007, the Alameda County Superior
 27 Court set aside the judgment and quashed the writ of execution. (COM ¶ 26.)

1 Based on Defendant's provision of the aforementioned legal services to Mount Hermon
 2 school, Ms. Omotade alleges twelve causes of action against defendants for fraud, intentional
 3 infliction of emotional distress, negligent infliction of emotional distress, constructive fraud,
 4 abuse of process, negligence, legal malpractice, breach of contract, breach of implied covenant
 5 of good faith and fair dealing, violation of the Fair Debt Collection Practices Act, violation of the
 6 Robbins-Rosenthal Act of California, and unfair business practices.¹ (Plaintiff's Complaint.) As
 7 a basis for each of the twelve causes of action, Omotade alleges that defendants obtained a
 8 judgment through a false declaration, provided a false or misleading declaration, submitted a
 9 false or misleading declaration, gave a false explanation of the meaning of the declaration in a
 10 letter, provided false information to the Court in its pleadings in opposition to the motion to set
 11 aside default judgment, tried to collect monies not owed to defendants, and failed to return the
 12 proper amount of money wrongfully garnished. (COM ¶¶ 36-39, 47, 62, 67, 75, 82, 88, 95, 101.)

13 Each of plaintiff's twelve causes of action fail to state a claim upon which relief may be
 14 granted. Specifically, each is either barred by California's litigation privilege codified as
 15 California Civil Code § 47(b) and/or fails as a matter of law because Defendants had no
 16 contractual relationship with plaintiff and did not owe her a legal duty.

17 **III. STANDARD OF REVIEW**

18 Federal Rule of Civil Procedure 8(a) provides that any pleading "which sets forth a claim
 19 for relief," such as a complaint, "shall contain," inter alia, "a short and plain statement of the
 20 claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The complaint must
 21 "give the defendant fair notice of what the plaintiff's claim is and the grounds up which it rests."
 22 *Swierkiewicz v. Sorema, N.A.* 543 U.S. 506, 512 (2002). Conclusory allegations, which are
 23 unsupported by any facts, do not satisfy the minimum pleading requirements of Rule 8.

24 Federal Rule of Civil Procedure 12(b)(6) permits the Court to dismiss claims that fail to
 25 state a claim upon which relief can be granted. Although the Court must accept the material
 26 allegations pled as true, the Court can and should disregard conclusory allegations or legal

27 ¹ The causes of action in the complaint are titled 1-13, however, there is no twelfth cause of action alleged.
 28

1 characterization nor need it accept unreasonable inferences or unwarranted deductions of fact.
 2 *Transphase Systems, Inc. v Southern Calif. Edison Co.*, (C.D. Cal. 1993) 839 F.Supp. 711, 718 .

3 The court may properly dismiss a complaint under Rule 12(b)(6) of the Federal Rules of
 4 Civil Procedure, where as here, there is either a “lack of cognizable legal theory” or “the absence
 5 of sufficient facts alleged under a cognizable theory.” *Balistreri v. Pacific Police Depo.*, (9th
 6 Cir. 1990) 901 F.2d 696, 699.

7 A motion to dismiss for failure to state a claim is proper when plaintiff has included
 8 allegations in the complaint, that on their face, disclose some absolute defense or bar to recovery:
 9 “If the pleadings establish facts compelling a decision one way, that is as good as if deposition
 10 and other expensively obtained evidence on summary judgment establishes the identical facts.”
 11 *Weisbuch v. County of Los Angeles* (9th Cir. 1997) 119 F.3d 778, 783 fn.1.

12 **IV. LEGAL ARGUMENT**

13 **A. Plaintiff Cannot Assert A Cause of Action for Fraud Because it is Barred by
 14 the California Litigation Privilege As a Matter Of Law**

15 Under California law, to establish a cause of action for fraud, plaintiff must prove the
 16 following elements: (1) a false representation, actual or implied, or concealment of a matter of
 17 fact material to the transaction which defendant had a duty to disclose or defendant's promise
 18 made without intention to perform; (2) defendant's knowledge of the falsity; (3) defendant's
 19 intent to deceive; (4) Plaintiffs' justifiable reliance thereon; and (5) resulting damage to plaintiff.

20 *Pearson v. Norton* (1964) 230 Cal.App.2d 1; *Small v. Frito Companies* (2003) 30 Cal.4th 167.

21 Fraud actions are subject to strict requirements of particularity in pleading. *Committee on
 22 Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216; *Nagy v. Nagy*
 23 (1989) 210 Cal.App.3d 1262.

24 California Civil Code § 47(b) provides that a publication made in the court of a judicial
 25 proceeding is privileged. The purpose of the privilege is to assure participants in the litigation
 26 “the utmost freedom of access to the courts without fear of being harassed subsequently by
 27 derivative tort actions.’ *Pacific Gas and Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d

1 1118, 1132, quoting *Silberg v. Anderson* (1990) 50 Cal.3d 205, 213. The privilege covers any
 2 communication, whether or not it amounts to a publication, and all torts except malicious
 3 prosecution. *Id.* 211-212. The court is only to examine whether the communication was made in
 4 furtherance of the object of the litigation; a defendant's "motives, morals, ethics, or intent are not
 5 in issue." *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 864.

6 The protection of California's litigation privilege is not limited to statements made in a
 7 courtroom or any other official proceeding. To the contrary, courts consistently have interpreted
 8 the absolute litigation privilege as precluding virtually all theories of recovery that in any way
 9 touch upon communication or publications involving judicial proceedings. *Rubin v. Green*
 10 (1993) 4 Cal.4th 1187, 1194. The privilege "applies to any publication required or permitted by
 11 law in the course of a judicial proceeding to achieve the objects of the litigation, even though the
 12 publication is made outside the courtroom and no function of the court or its officers is
 13 involved." *Silberg, supra*, 20 Cal.3d at 212. The test for application of the privilege is that it
 14 applies to any communication that is (1) made in judicial or quasi-judicial proceedings; (2) by
 15 litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and;
 16 (4) that have some connection or logical relation to the action. *Id.* at 212.

17 In the present action all of the allegations that form the basis of plaintiff's first cause of
 18 action for fraud are communications and/or publications that are completely protected by the
 19 California litigation privilege. Plaintiff alleges that defendant Glassberg signed and submitted a
 20 declaration that he knew was untrue, that defendant Auerbach sent a letter explaining
 21 Glassberg's declaration which contained factual inaccuracies, that defendants knew that the
 22 opposition to plaintiff's motion to set aside default judgment was untrue, and that defendants
 23 knew they were not returning the correct amount seized pursuant to the levy on plaintiff's
 24 account. (COM ¶¶ 36-39.) Each of these communications and/or publications were made by
 25 defendants to further the Underlying Action for the collection of debts owed by Ms. Omotade.
 26 Each of the communications or publications were made in furtherance of the collection of
 27 outstanding debts owed and each had a logical connection to the Underlying Action.

1 California district courts have consistently held that the litigation privilege is a complete
 2 bar to a fraud claim based on analogous facts. In *Sengchanthalangsky v. Accelerated Recovery*
 3 *Specialists* (S.D. Cal., 2007) 473 F. Supp.2d 1083, plaintiff consumers sued a collection agency,
 4 financial services agency and others for common law fraud, negligence and violations of the Cal.
 5 Bus. & Prof. Code § 17200 for, among other things, representations made in an affidavit of
 6 correctness which verified that plaintiff was a proper debtor. Defendants moved the court to
 7 dismiss the causes of action for negligence, fraud, and violations of Section 17200 as barred
 8 under California's litigation privilege. Defendants contended that the affidavit was connected to
 9 the underlying debt collection litigation because it was created and attached to a settlement letter.
 10 *Id.* at 1087. The court held that the litigation privilege barred all three causes of action. *Id.* at
 11 1089. In doing so, the court noted, that California courts have long extended statements beyond
 12 actual judicial proceedings to include pre-litigation communication, such as demand letters, as
 13 well as out-of-court statements. *Id.* at 1088.

14 Here, each of Defendants' communications, including the declaration, and any and all
 15 letters or statements were connected to and made in furtherance of the Underlying Action, and
 16 therefore plaintiff's fraud claims is barred by the litigation privilege.

17 **B. Plaintiff's Second and Third Causes of Action for Intentional and Negligent
 18 Infliction of Emotional Distress are Barred by the California Litigation
 19 Privilege As a Matter of Law**

20 Plaintiff bases her second and third causes of action for intentional and negligent
 21 infliction of emotional distress on the same factual allegations pled in support of her cause of
 22 action for common law fraud. As previously stated, California's litigation privilege is an
 23 absolute bar to any tort claim based on communications made in relation to a judicial proceeding.
 24 Moreover, allegations of malice do not limit the scope of the litigation privilege. California law
 25 allows the application of the litigation privilege even when a statement is made with malice.
Sengchanthalangsky v. Accelerated Recovery Specialists, supra, 473 F. Supp.2d at 1088.
 26 Although a reviewing court looks to whether a party makes a communication in good faith, such
 27 a standard is separate from whether malice is intended. A statement is protected by the litigation

1 privilege when the statement is made in connection with a proposed litigation that is
 2 contemplated in good faith and under serious consideration. *Id.*

3 Therefore, irrespective of whether malicious conduct is alleged, plaintiff's second and
 4 third causes of action are completed barred by the litigation privilege as a matter of law.

5 **C. Plaintiff's Fourth Cause of Action For Constructive Fraud Fails As A Matter
 6 of Law**

7 **1. Plaintiff's Constructive Fraud Cause of Action Fails Because
 8 Omotade and Defendants Did Not Have a Fiduciary Relationship**

9 Constructive fraud is a unique species of fraud applicable only to a fiduciary or
 10 confidential relationship. *Assilzadeh v. California Federal Bank, FSB* (2000) 82 Cal.App.4th
 11 399, 415. Constructive fraud is marked by any act or omission involving a breach of a legal or
 12 equitable duty, trust or confidence which results in damage to another even though the conduct
 13 may not otherwise be fraudulent. *Id.* Plaintiff cannot establish a fiduciary relationship existed
 14 between herself and defendants. Such a relationship is a precondition to a cause of action for
 15 constructive fraud. See *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.

16 A fiduciary relationship is

17 'any relation existing between parties to a transaction wherein one of the parties is
 18 in duty bound to act with the utmost good faith for the benefit of the other party.
 19 Such a relation ordinarily arises where a confidence is reposed by one person in
 20 the integrity of another, and in such a relation the party in whom the confidence is
 21 reposed, if he voluntarily accepts or assumes to accept the confidence, can take no
 22 advantage from his acts relating to the interest of the other party without the
 23 latter's knowledge or consent. . . .'

24 *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29.

25 Here, plaintiff cannot allege that defendants owed her a fiduciary duty. As clearly
 26 articulated by plaintiff's complaint, defendants were hired by Mount Hermon to provide legal
 27 services in connection with collecting debts owed by plaintiff. (COM ¶¶ 10-13.) Defendants
 28 owed a fiduciary duty to their client, Mount Hermon, and had no fiduciary duty to a party
 29 adverse to Mount Hermon in the Underlying Action. As a general rule, California courts hold
 30 that an attorney owes no duty or professional obligation to a non-client. *Moore v. Anderson
 31 Zeigler Disharoon Gallagher & Gray, P.C.* (2003) 109 Cal.App.4th 1287. According to *Moore*,

1 "an attorney generally will not be held liable to a third person not in privity of contract with him
 2 since he owes no duty to anyone other than his client. *Id.* at 1294.

3 **2. The Litigation Privilege Completely Bars Plaintiff's Cause of Action
 4 for Constructive Fraud.**

5 Plaintiff alleges no new facts in support of its constructive fraud cause of action, but
 6 instead incorporates the previous paragraphs in its complaint which form the basis for her first
 7 three causes of action. As previously stated, the California litigation privilege completely bars
 8 any cause of action for fraud.

9 **D. The California Litigation Privilege Completely Bars Plaintiff's Fifth Cause of
 10 Action for Abuse of Process**

11 The tort of abuse of process constitutes the use of a legal process against another to
 12 accomplish a procedural purpose for which it is not designed. *Brown v. Kennard* (2001) 94
 13 Cal.App.4th 40. In support of her claim, Omotade re-alleges the same facts used to support her
 14 first four causes of action, i.e. providing a false declaration, drafting a misleading letter to her
 15 counsel explaining the declaration, providing false information to the court in its pleadings
 16 opposing the motion to set aside default judgment, and communications regarding monies owed
 17 and garnished. (COM ¶ 62.)

18 Each of these communications is protected by the litigation privilege. The litigation
 19 privilege is an available defense to the tort of abuse of process. *Adams v. Superior Court* (1992)
 20 2 Cal. App. 4th 521, 528-529. In *Adams*, plaintiff brought an action against individual attorneys
 21 and a law firm, alleging abuse of process, after the attorneys filed unsuccessful motions for
 22 reconsideration of plaintiff's motions to reduce or expunge her prior felony convictions in other
 23 courts.

24 In *Adams*, the court found that a defendant in an action for abuse of process may rely
 25 upon the defense of judicial privilege, pursuant to Civ. Code, § 47, provided that there is some
 26 reasonable connection between the act claimed to be privileged and the legitimate objects of the
 27 lawsuit in which that act took place. The privilege is broadly applied to protect most publications

1 within lawsuits, provided there is some connection between the lawsuit and the publication. Any
 2 doubt as to whether the privilege applies is resolved in favor of it applying. *Id.* at 529. Each of
 3 the communications purporting to support Ms. Omotade's cause of action for abuse of process
 4 were made in connection with the Underlying Action to collect outstanding debts. As such, this
 5 cause of action is barred as a matter of law.

6 **E. Plaintiff's Sixth and Seventh Causes of Action for Negligence and Legal
 7 Malpractice Fail As a Matter of Law**

8 **1. Plaintiffs Causes Of Action for Negligence and Legal Malpractice Fail
 9 Because Defendants Did Not Owe Omotade a Duty**

10 To prevail on a cause of action for negligence, plaintiff must plead and prove the
 11 essential elements, including duty, breach ,causation and damages. See generally, *Ventura
 12 County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 902. An action in negligence
 13 requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the
 14 duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. *Benedek v.
 PLC Santa Monica, LLC* (2002) 104 Cal.App.4th 1351, 1356.

15 To support its legal malpractice cause of action, plaintiff alleges that Defendants owed
 16 her a duty of care, that defendants failed to exercise reasonable and due care in the provision of
 17 their legal services, causing plaintiff to suffer damages. (COM ¶¶ 74-76) Therefore, plaintiff's
 18 allegation of legal malpractice is really a negligence claim. As stated, an essential element of a
 19 cause of action for negligence, is duty.

20 *Moore v. Anderson Zeigler Disharron Gallagher & Gray, P.C.* (2003) 109 Cal.App.4th
 21 1287, explains that:

22 as a general rule, an attorney has no professional obligation to nonclients and thus
 23 cannot be held liable to nonclients for the consequences of the attorney's
 24 professional negligence. [citations] Consequently, 'an attorney generally will not
 be held liable to a third person not in privity of contract with him since he owes
 no duty to anyone other than his client.'

25 *Id.* at 1294. "As an exception to this general rule, it has been settled in California that an
 26 attorney may be liable to non-clients in limited circumstances where the non-client was the
 27 intended beneficiary of the attorney's services." *Id.* at 1294-1295. (Italics in original.)

1 However, in *Norton v. Hines* (1975) 49 Cal.App.3d 917, the court rejected the plaintiffs' 2 argument that a departure from the general rule should be made where it was foreseeable that 3 actions by the adversary's lawyer would cause injury to the non-client. The court stated, "in the 4 case at bar a former litigant is suing adverse counsel. Clearly, an adverse party is not an intended 5 beneficiary of the adverse counsel's client." *Id.* at 922.

6 Ms. Omotade was an adverse party to Defendants' client in the Underlying Action. The 7 weight of California authority concurs that Defendants did not owe her a duty. Accordingly, 8 plaintiff's causes of action for negligence and legal malpractice fail as a matter of law.

9

10 **2. California's Absolute Litigation Privilege Bars Plaintiff's Causes of Action for Negligence and Legal Malpractice.**

11 Plaintiff's causes of action for negligence and legal malpractice fail for the separate 12 reason that they are completely barred by the litigation privilege. Each of the alleged 13 communications supporting these two causes of action were made pursuant to and in furtherance 14 of the Underlying Action. As previously stated, federal district courts have barred tort based 15 causes of action based on facts similar to those in the present matter. See *Sengchanthalangsky*, 16 *supra* 473 F. Supp.2d 1083.

17 **F. Plaintiff Cannot Assert Causes of Action for Breach of Contract and Breach 18 of the Implied Covenant of Good Faith and Fair Dealing Because Defendants Did Not Enter Into a Contract With Plaintiff**

19 In support of both her breach of contract and breach of the implied covenant of good faith 20 and fair dealing causes of action, plaintiff alleges, "Defendant Northfield Mount Hermon School 21 entered into a contract of settlement by and through their attorney of record, Glassberg, Pollak & 22 Associates." (COM ¶¶ 80, 86.) This is plaintiff's only allegation regarding the existence of a 23 contract. Plaintiff does not allege that she entered into any contract with Glassberg Pollak & 24 Associates or any of its employees.

25 "The construction and enforcement of settlement agreements are governed by principles 26 of local law which apply to interpretation of contracts generally." *United Commercial Ins. Service, Inc. v. Paymaster Corp.*, (9th Cir. 1992) 962 F.2d 853, 856. California law has never 27

1 held that an attorney is a party to a settlement agreement entered into between his client and an
 2 adverse party. Here, Defendants did not enter into a contract with plaintiff. Therefore plaintiff's
 3 causes of action based on contract fail as a matter of law.

4 **G. Plaintiff's Tenth Cause of Action for Violation of the Fair Debt Collection
 5 Practices Act ("FDCPA") Fails Because Defendants' Alleged Conduct Does
 6 Not Amount to "Communication" Under the FDCPA**

7 In support of its tenth cause of action for violation of the FDCPA 15 U.S.C. 1692 et seq.
 8 (erroneously cited by plaintiff as 7 U.S.C. 801 et al.), plaintiff re-asserts the same allegations
 9 regarding defendants' conduct in the Underlying Action, used to support her other nine causes of
 10 action. However as evidenced by plaintiff's complaint, all communications at issue were filed
 11 with the court during the Underlying Action or served on plaintiff's counsel.

12 Specifically, plaintiff alleges that defendant breached the FDCPA by: (1) Submitting a
 13 false declaration to the court; (2) Trying to collect more money than is owed; (3) Submitting
 14 false explanations to the Court in support of a wrongfully obtained judgment; (4) Obtaining a
 15 judgment on false grounds; (5) Garnishing plaintiff's bank account based on a judgment
 16 defendants, and each of them, knew was based on false grounds; (6) Not voluntarily returning all
 17 the monies garnished after the judgment was set aside and then when returned not returning the
 18 proper amount; (7) Continuing to accept payments from plaintiff knowing that a judgment was
 19 requested, and not telling plaintiff; and, (8) Misleading plaintiff to continue making payments on
 20 the payment plan while at the same time informing the court that plaintiff was not making
 21 payments and obtaining a judgment. (COM ¶ 95.)

22 In *Guerrero v. RJM Acquisition LLC*, 499 F.3d 926 (9th Cir. 2007), the Ninth Circuit
 23 held that a communication directed to a debtor's counsel was not subject to the FDCPA. The
 24 court found that the purpose of the FDCPA "is to protect vulnerable and unsophisticated debtors
 25 from abuse, harassment, and deceptive collection practices." *Id.* at 938. However, the court
 26 reasoned that

27 [w]hen an individual is represented by counsel who fields all communications
 28 relevant to the debt collection, these concerns quickly evaporate... 'when an
 attorney is interposed as an intermediary between a debt collector and a
 consumer, we assume the attorney, rather than the FDCPA will protect the

1 consumer from a debt collector's fraudulent or harassing behavior.' (citations
 2 omitted)

3 *Id.* at 939.

4 The court further reasoned, that the act was "meant to shield debtors from abusive
 5 collection practices, but it was never intended to shift the balance of power between debtors and
 6 creditors....[n]or was it intended as a sword to be brandished by debtors least in need of the
 7 Act's protections." *Id.* at 941.

8 The ninth circuit found that in enacting the FDCPA,

9 Congress was concerned with disruptive, threatening and dishonest tactics. The
 10 Senate Report accompanying the Act cites practices such as 'threats of violence,
 11 telephone calls at unreasonable hours [and] misrepresentation of a consumer's
 legal rights.' S. Rep. 95-389, at 2. In other words, Congress seems to have
 contemplated the type of actions that would intimidate unsophisticated
 individuals and which, in the words of the seventh circuit 'would likely disrupt a
 debtor's life.'

12 *Id.* at 939 (citations omitted).

13 Plaintiff does not allege any of the aforementioned practices which Congress
 14 contemplated when creating this legislation. Here, all of Defendants' alleged conduct took place
 15 in furtherance of the Underlying Action. Defendants' allegedly actionable communication was
 16 all directed to the court and eventually served on plaintiff's counsel. Therefore, the
 17 communications at issue were not the type of communication intended to be protected under the
 18 FDCPA.

19 Courts from outside this circuit have also consistently taken the position that when
 20 communications are made to the court and/or monitored by counsel, the protections of the
 21 FDCPA are no longer necessary. In *Argentieri v. Fisher*, (D. Mass. 1998) 15 F. Supp. 2d 55, the
 22 plaintiff claimed that an allegedly improper prayer for attorneys' fees contained in a state court
 23 collection complaint violated the FDCPA. The *Argentieri* court held that the FDCPA claim
 24 failed. In doing so, the court reasoned, "[t]he whole purpose of regulating debt collection was to
 25 'supervise' a range of unsupervised contacts, such as demand letters and late-night phone calls.
 26 In contrast, a statement made in a pleading is supervised by the court and monitored by counsel.
 27 The two situations are drastically different." *Id.* at 61. The court further stated,

[t]he courts have their own system of protections against abusive tactics that occur during litigation. a grossly exaggerated debt or unfounded claim in a pleading could represent an abuse of process, and subject the attorney or client to sanctions or other disciplinary mechanisms. Given these protections, when a claim is made to the court, there is no need to invoke protections of a statute designed to protect consumers from unscrupulous, unsupervised debt collections tactics such as threats of violence and harassing telephone calls.

Id. at 61-62 (citations omitted).

California Courts and the California legislature have in place a separate statutory scheme to afford litigants protection. Attorneys are regulated by and subject to discipline pursuant to the California Business and Professional Code and the Rules of Professional Conduct. See Cal. Bus. & Prof. Code §§ 6075, 6077. These statutes mandate, that attorneys “counsel or maintain those actions, proceedings, or defense as appear to him or her to be just” and that attorneys must employ “those means only as are consistent with truth,, and never seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact.” See Cal. Bus. & Prof. Code §§ 6068(c), (d); Cal. Rules Prof. Conduct, Rule 5-200(A), (B).

As evidenced, communications made to the court or to counsel, particularly those at issue in the present matter, were not intended to form the basis of a FDCPA claim. Therefore, plaintiff's tenth cause of action fails as a matter of law.

H. Plaintiff's Eleventh and Thirteenth Causes of Action for Violation of the Rosenthal Fair Debt Collection Practice Act (“RFDCPA”) and Unfair Business Practices Fails as A Matter of Law

1. Plaintiff's Eleventh and Thirteenth Causes of Action for Violation of the Rosenthal Fair Debt Collection Practice Act (“RFDCPA”) and Unfair Business Practices are Barred By the California Litigation Privilege

Plaintiff re-alleges identical facts used to support its ten other causes of action in support of its RFDCPA and unfair business practices claims. All of defendants claimed conduct qualifies as communication made in a judicial proceeding to achieve the objects of the litigation and are logically related to the Underlying Action. California Federal District Courts have found the litigation privilege bars claims under the RFDCPA.

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In *Taylor v. Quall* (E.D. 2006) 458 F. Supp.2d 1065, plaintiff debtor sued defendants for improper methods used to collect the debt owed by plaintiff. Plaintiff claimed that defendants improperly brought an action against plaintiff seeking payment of the debt and made multiple misrepresentations to plaintiff until he ultimately settled the action. Plaintiff alleged California state law claims under the RFDCPA and California Business and Professional Code § 17200. Defendants moved to dismiss the state law claims on the ground that they were barred by the litigation privilege codified in Cal. Civ. Code § 47(b). *Id.* at 1067. The court held that both the RFDCPA and the Section 17200 claims were barred by the litigation privilege.

In *Taylor*, the court rejected plaintiff's argument that the Supreme Court's decision in *Heintz v. Jenkins*, 514 U.S. 29 (1995) foreclosed the application of the litigation privilege. The court found that *Heitz* was solely concerned with the construction of the term "debt collector" within the FDCPA and did not address the relevance of California's litigation privilege. *Id.* at 1068. The court reasoned that all the allegedly wrongful debt collection practices engaged in by defendants occurred in the context of litigation. The complaint made clear that all communications to plaintiff occurred between the time the summons and complaint were served, and the action settled. Therefore, the court found the communications were privileged defeating plaintiff's state law claims. *Id.* at 1067.

18 The facts of *Taylor* almost identically parallel those alleged in plaintiff's complaint.
19 Here, the alleged communications occurred during the Underlying Action and in furtherance of
20 enforcing a judgment pursuant to that action. Therefore, both plaintiff's causes of action under
21 the RFDCPA and for California unfair business practices are subject to the litigation privilege
22 and fail as a matter of law.

2. Defendants Do Not Qualify As “Debt Collectors” Under the Rosenthal Fair Debt Collection Practices Act (“RFDCPA”)

25 Attorneys are expressly exempted from the definition of “debt collectors” in the
26 RFDCPA. Cal. Civ. Code § 1788.2(b) specifically states,

27 The term debt collectors means any person who, in the ordinary course of business, regularly, on behalf of himself or herself or

others, engages in debt collection. The term includes any person who composes and sells, or offers to compose and sell, forms, letters and other collection media used or intended to be used for debt collection, *but does not include an attorney or counselor at law.*

Id. (emphasis added). As the California Civil Code expressly exempts attorneys from the definition of debt collector, plaintiff's claim under the RFDCPA against Defendants fails as a matter of law.

I. Plaintiff Fails to Allege a Twelfth Cause of Action

Plaintiff's causes of action are numbered 1-13 respectively. However, plaintiff's complaint does not allege a twelfth cause of action, and therefore it must be stricken.

V. CONCLUSION

As established above, plaintiff's complaint fails to allege any cause of action upon which relief may be granted. Accordingly, Defendants respectfully request that the court grant their motion to dismiss plaintiff's complaint in its entirety.

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